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IN THE

# Supreme Court of the United States

October Term, 1959

No. .....

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation,

*Appellant,*

*vs.*

BOARD OF SUPERVISORS OF LOS ANGELES COUNTY, BURTON CHACE, CHAIRMAN, FRANK BONELLI, WARREN DORN, JOHN ANSON FORD and KENNETH HAHN, CONSOLIDATED COUNTY FIRE PROTECTION DISTRICT, and KEITH KLINGER,

*Appellees.*

**Appeal From the District Court of Appeal of the State of California, Second Appellate District.**

## STATEMENT AS TO JURISDICTION.

In compliance with Rule 15 of the Revised Rules of the Supreme Court of the United States, appellant submits herewith its statement as to the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, Division Three, the petition of appellant for a hearing by the Supreme Court of the State of California having been denied.

## The Opinion Below.

The opinion of the District Court of Appeal of the State of California in this cause is reported in 166 A. C. A. 616, 333 P. 2d 378. A copy of this opinion is attached hereto as Appendix "A."

## Jurisdiction.

Appellant's action seeks to have certain statutes of the State of California declared unconstitutional, and an order by the Board of Supervisors issued pursuant thereto, that certain real property of appellant is annexed to the Consolidated County Fire Protection District, declared to be null and void, on the ground that unless said order is set aside appellant will be deprived of its property without due process of law.

The Superior Court of the State of California, in and for the County of Los Angeles, entered a judgment on June 25, 1958, that said order of annexation was null, void and of no effect; but this judgment was reversed, on appeal, by the District Court of Appeal of the State of California by decision filed December 23, 1958. On February 18, 1959, the Supreme Court of the State of California denied appellant's petition for a hearing by that Court, which had been filed within the time allowed by Rules 28 and 29 of the Rules on Appeal of the Supreme Court of the State of California. The decision of the District Court of Appeal of the State of California is, therefore, the final judgment of the courts of California. A notice of appeal to the Supreme Court of the United States was filed with the District Court of Appeal of the State of California, Second Appellate District, on March 20, 1959. The jurisdiction of the Supreme Court of the United States to review the decision by direct appeal is conferred by Title 28,

United States Code, Section 1257(2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306;

*New York v. New York, New Haven & Hartford R. Co.*, 344 U. S. 293;

*Walker v. City of Hutchinson*, 352 U. S. 112;

*Wisconsin Elec. Power Co. v. Milwaukee*, 352 U. S. 948;

*Fallbrook Irrig. District v. Bradley*, 164 U. S. 112.

## Statutes Involved.

The statutes involved include Sections 14510, 14511, 14512, 14513, 14514, 14515 and 14516, of the Health and Safety Code of the State of California (Cal. Stats. 1939, ch. 60, p. 850; 1949, ch. 544, p. 946, ch. 741, p. 1362); and Sections 6 and 7 of "The First Validating Act of 1958" (Cal. Stats., First Extraord. Sess., ch. 10). The text of these statutes is set out verbatim in Appendix "B" attached hereto.

## Questions Presented.

1. Whether notice of hearing on annexation to the Los Angeles County Consolidated Fire Protection District given by publication only by the Board of Supervisors for Los Angeles County, pursuant to State statute (Health & Safety Code, Sec. 14511), is adequate to comply with the requirements of due process of law as provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States, where the interest, name and address of the property owner affected by such an-

nexation was known by, in the possession of, and readily available to said Board of Supervisors; and

2. Whether an order of the Board of Supervisors of Los Angeles County for annexation of real property to the Los Angeles County Consolidated Fire Protection District, entered without publishing the notice or conducting the hearing on annexation required by State statutes (Health & Safety Code, Secs. 14510-14515, inclusive), violated the requirements of due process of laws as provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States; and

3. Whether an owner of real property is entitled, by the requirements of due process of law provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States, to notice and a hearing prior to annexation of its property to a Consolidated County Fire Protection District in the State of California, and prior to attachment of a lien for payment of a tax or assessment to said Fire Protection District.

## Statement.

Appellant, The Firestone Tire and Rubber Company, an Ohio corporation lawfully doing business in California, is the owner of a parcel of land situated in the County of Los Angeles, State of California, which appellant has owned and occupied since the year 1927, and on which it has constructed and maintains a large factory.

Fire protection service has been provided for this property through the forces and equipment of appellant, supplemented since the year 1939 by forces obtained through a contract between the appellant and the City of South Gate, California.

The County of Los Angeles does not maintain any fire protection facilities in the area of the county in which the appellant's property is situated. In point of fact, almost all of the fire protection facilities of the County of Los Angeles are concentrated in the mountainous and desert regions of the county. Accordingly, in certain areas of the county, the residents and property owners have formed special tax districts, termed County Fire Protection Districts, for the purpose of obtaining the benefit of better fire protection services than are afforded by the general County government. These districts are formed under the authority of the provisions on "County Fire Protection Districts" set forth in Sections 14400 to 14598.5, inclusive, of the Health and Safety Code of the State of California. The property included in a County Fire Protection District is subject to the levy of a special tax that is not levied on property within the County which is not within the District. (Health & Safety Code, Sec. 14480; see App. "B" hereto.) This special tax is levied and collected at the same time and in the same manner as taxes levied for County purposes, but may be used only ". . . with respect to the district within which collected and for no other purpose." (Health & Safety Code, Sec. 14481; see App. "B" hereto.)

The Health and Safety Code provides that territory may be annexed to a "County Fire Protection District" by a resolution of the Board of Supervisors for the County in which the District is located, adopted after a hearing, on notice to the affected parties, on the question of whether or not the territory concerned will benefit by inclusion within the District. (Health and Safety Code, Secs. 14510 to 14515, incl.; see App. "B" hereto.) The code requires that notice of the hearing, designating the terri-

tory proposed to be annexed, shall be published once a week, for two successive weeks, in a newspaper circulated in the territory which it is proposed to annex, which the Board deems most likely to give notice to the inhabitants of the territory. (Health and Safety Code, Secs. 14510, 14511, 14512, 14513; see App. "B" hereto.) Property in territory annexed to the District is subject to taxes to pay the principal and interest on bonds issued for the account of the District and outstanding at the time of annexation. (Health and Safety Code, Sec. 14516; see App. "B" hereto.)

This matter concerns an attempt to annex the real property of the appellant to the largest of these special tax districts, the Consolidated County Fire Protection District, without holding a hearing on the question of benefit as required by law. The appellant maintains that its property would not benefit by inclusion within the District, and that appellant has the right, under the provisions of Article XIV, Section 1, of the Amendments to the Constitution of the United States, on due process of law, to have the question of benefit determined by the Board of Supervisors after notice and a proper hearing. The appellees, Board of Supervisors, *et al.*, maintain that the property owner (appellant) does not have a constitutional right to notice and a hearing on the question of benefit before its property is annexed to a County Fire Protection District.

There have been two proceedings for the annexation of this property to the Consolidated County Fire Protection District for Los Angeles County:

In the first proceeding, identified as Annexation 47-57, the Board of Supervisors adopted a resolution on August 8, 1957, purporting to annex the property of appellant to the Consolidated County Fire Protection District. The

only notice of the hearing of August 8, 1957, was published in a weekly newspaper, "The Florence Messenger," that was not published, circulated or distributed in the territory which was the subject of the annexation proceeding. The fact that appellant is the owner of this real property is a matter of public record, and is known to the officers of the County of Los Angeles, from the records of the County Assessor. Appellant did not, as a matter of fact, have any notice or knowledge of the annexation proceeding until after the resolution of annexation had been passed. Appellant then, on December 24, 1957, filed a petition with the Board of Supervisors requesting the withdrawal of its property from the Consolidated County Fire Protection District, on two grounds: first, that the annexation proceedings were invalid; and, secondly, that it would receive no benefit from annexation to the said Fire Protection District.

The petition came on for hearing before the Board on January 22, 1958, and the Board refused to rule upon the matter at that time and continued the hearing, from time to time, until April 17, 1958. On the first Monday in March, 1958, a "lien" was placed upon appellant's property, by state law, for the payment of all taxes and assessments, including those of the Consolidated County Fire Protection District, that would be levied by the Board of Supervisors in 1958. (Rev. and Tax. Code, Sec. 2192.)

When the petition finally came on for hearing before the Board, on April 17, 1958, the County Counsel advised the Board that, as a matter of law, the annexation proceeding was valid. Counsel for appellant then advised the Board that appellant would initiate a "test suit" to determine the validity of an annexation proceeding conducted

without the notice or hearing required by statute, and without actual notice to the interested property owner.

On May 14, 1958, appellant commenced an action in the Superior Court of the State of California, in and for the County of Los Angeles, by filing its "Petition for Writ of Certiorari and Writ of Mandate: Complaint for Declaratory Relief."

In this action, appellant alleged that, unless the resolution on annexation were set aside, its property would be subject to a lien for the payment of a special tax, or assessment, on behalf of said Consolidated County Fire Protection District, which lien had attached at noon on the first Monday of March of 1958, and that it would be deprived of its property without due process of law. Appellant also alleged that the Board of Supervisors pretended that the statutes of the State of California authorized the Board

> "... to order real property annexed to the Consolidated County Fire Protection District, without providing the property owner with notice or other opportunity for hearing, and without taking any evidence on whether said real property will be benefited by annexation to said Consolidated County Fire Protection District,"

and prayed for a decree that, if the

> "statutes of the State of California provide that real property may be annexed without notice and an opportunity for a hearing, they are void and invalid as being in violation of the Constitutions of the State of California and the United States of America."

The trial court, on June 27, 1958, entered judgment that the resolution authorizing the annexation of the said prop-

erty was null, void and of no effect. The Board of Supervisors, *et al.*, appealed from the judgment to the District Court of Appeal of the State of California, Second Appellate District (Division Three). Meanwhile, on June 11, 1958, the County Board of Supervisors and the Consolidated County Fire Protection District had initiated a second proceeding for the annexation of this property to the district. The second proceeding, identified as Annexation 34-58, was stayed by an order of the District Court of Appeal entered on August 20, 1958.

The District Court of Appeal permitted the two matters to be submitted for decision upon a combined record and briefs, and disposed of both by an opinion, filed December 23, 1958, treating them separately. The District Court held that the findings of the trial court were amply sustained by the evidence, and that the notice of the hearing on annexation was vitally defective as a statutory notice, for two reasons: First, it was not published in a newspaper distributed within the territory to be annexed, as required by the statute; second, that the description of the property to be annexed was not one which would put a person reading it upon notice that his property was within the boundaries as described.

However, the District Court reversed the judgment of the trial court, and ordered the trial court to enter judgment that the proceedings known as Annexation 47-57 were valid, on the ground that the failure of the published notice to comply with the requirements of the applicable statute had been cured by the First Validating Act of 1958, enacted by the California Legislature at an Extraordinary Session and effective April 7, 1958. (Stat. 1958, 1st Ext. Sess., Chap. 10, Secs. 4, 6 and 7; see App. "B" hereto.)

This Validating Act, in its terms, is limited to "the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions" (Act, Sec. 6(b); see App. "B"). The District Court of Appeal found that the notice herein given did not satisfy the constitutional requirements of due process, but held that appellant was not entitled, as a matter of constitutional right, to a notice or hearing in this instance. It stated that the constitutional right was only present in the case of annexation to a "special assessment district created for the primary purpose of assessing upon private lands the benefits to be derived from a public improvement for the construction of which the district is formed . . .," and that a property owner was not, as a matter of constitutional right, entitled to notice or hearing of an annexation to Consolidated County Fire Protection Districts, which were described as "public corporations in the nature of municipalities."

The District Court of Appeal held that as the order entered in Annexation 47-57 was valid, the Board had no jurisdiction to act in Annexation 34-58, and the writ of prohibition issued against that proceeding. A copy of the opinion of the District Court of Appeal is attached hereto as Appendix "A."

Within the time allowed, appellant filed a petition for hearing by the Supreme Court of the State of California, but this was denied.

On March 20, 1959, appellant, the Firestone Tire and Rubber Company, filed a Notice of Appeal to the Supreme Court of the United States from the judgment of the District Court of Appeal that the annexation known as Annexation 47-57 was valid, and that the lands of appellant had been annexed to said Consolidated County Fire Protection District.

## The Questions Are Substantial.

It is evident, from the foregoing statement, that two basic issues are raised by this appeal, as follows:

FIRST: The right of a property owner to a hearing, on notice, before his land is annexed to a special tax district by a decision of the Board of Supervisors. This is similar to the issue raised in *Fallbrook Irrigation District v. Bradley*, 146 U. S. 112.

SECOND: The insufficiency of notice by publication. This is similar to the issue raised in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306; *New York v. New York, New Haven and Hartford R. Co.*, 344 U. S. 293; *Walker v. City of Hutchinson*, 352 U. S. 112; and *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948.

These issues are of importance to all owners of real property.

### A. Owner of Real Property Is Entitled to Notice of Hearing on Annexation to a Special Tax District, Such as County Fire Protection District.

It is submitted that the District Court of Appeal of the State of California erred in holding that the decisions of this Honorable Court, cited above, were not applicable in this instance.

As stated in the opinion of the District Court, the ruling was based on the proposition that the constitutional right of a property owner to a hearing is only present in the case of annexation to a "special assessment district," and does not extend to proceedings for annexation to a County Fire Protection District because the latter are deemed "public corporations in the nature of municipalities." (See Opin., App. "A" hereto, p. 11.)

It is submitted that the limitation placed by the District Court of Appeal on the constitutional right to a hearing is without support in law. The right to a hearing on annexation of land to a special district is not dependent upon the nature of the district, or public corporation; it exists whenever the determination is not made by the Legislature itself but is submitted by it to a tribunal, such as the Board of Supervisors. This principle was clearly stated by this Honorable Court in the leading case of *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 174-175, as follows:

> "There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which requires notice to or hearing of the parties included therein before it can be formed. It is created for a public purpose, and it rests in the discretion of the legislature when to create it, and with what powers to endow it.
>
> ". . . But when . . . the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. . . ."

It is submitted that the decision of this Honorable Court in the *Fallbrook* case, *supra,* is based squarely upon the

distinction between the power of the Legislature to create a public corporation by its own act, and the consequences of the delegation of that power to a tribunal, such as the board of supervisors in this instance. In the latter case, it is clear that the parties are entitled to a hearing, for the Legislature has not itself decided the question of benefit. It is evident that the District Court of Appeal completely ignored the basic principle set forth in the *Fallbrook* case, for the cases cited to support the proposition that there is no right to hearing and to a notice on annexation, *i. e., In re Orosi Public Utility District*, 196 Cal. 43, 235 Pac. 1004, and *People v. Town of Ontario*, 148 Cal. 625, 84 Pac. 205, involved situations where the determination of boundaries was not submitted to an inferior tribunal but was delegated by the Legislature to the electorate of the territory involved, to be determined upon an election.

The misconception of the District Court is squarely evidenced by the attempt in its opinion (App. "A" hereto), to justify the holding, that there is no constitutional right to a hearing, by the proposition that although the District may issue bonds to finance capital improvements and the territory annexed to the District is subject to taxation to pay the principal and interest on outstanding bonds (Health and Safety Code, Sec. 14516), the District does not have the power to make an assessment for public improvements and, therefore,

> "annexation does not . . . deprive the owners of the property within the annexed territory of any property or impose upon them liability for any public improvement but only renders their property subject to a general ad valorem tax which is levied on all property in accordance with its value and irrespective of the benefits conferred." (App. "A," p. 12.)

That the right to notice and a hearing is not determined by the distinction between an assessment, and an "ad valorem" tax; is clearly stated in the *Fallbrook* case, for there, too, the public corporation had the power to levy an *ad valorem* tax without regard to the question of benefit, and your Honorable Court held that the Federal Constitution guaranteed a property owner the right to notice and a hearing before his property could be included in the district. As your Honorable Court stated in the *Fallbrook* case (164 U. S. 112, 176):

> "Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. . . ." (See also, *Browning v. Hooper*, 269 U. S. 396.)

It is submitted that the present case is "on all fours" with the rule laid down in *Fallbrook Irrigation Dist. v. Bradley, supra,* and that as the Legislature did not decide the question of benefit, itself, the landowner (appellant) had the right to be heard upon that question before its property was included in the district. To limit the *Fallbrook* rule, as attempted by the District Court of Appeal, to public corporations that are classified, under state law, as "special assessment districts," and to exclude public corporations classified by state law as "municipalities" would, in effect, deprive the citizens of the United States of the protection of the Federal Constitution.

In point of fact, public corporations formed for fire protection purposes are generally classified as "special districts" rather than "municipalities." (See *Floyd v. Parker Sewer District*, 203 S. C. 276, 17 S. E. 2d 223:—Legis-

lature had power to create a district with powers limited to fire protection and sewage disposal; the general tax levied for the district was regarded as an assessment to maintain fire protection and garbage service, which may be classified as a local improvement; *Fountain City Sanitary Dist. v. Knox Co. Election Comm.* (Tenn., 1957), 308 S. W. 2d 482:—a district created by the Legislature with limited powers of maintaining sewerage, water services and fire protection, held not to be a municipality but to be a utility district, sometimes defined as a *quasi*-public corporation.)

Until the decision of the District Court of Appeal of the State of California, in the instant case, a County Fire Protection District had been compared, in the law of California, "with an assessment district for a certain definite and particular improvement." (*Norman v. Cogswell,* 82 Cal. App. 159, 162, 255 Pac. 251; *Fire Protection Dist. v. Board of Supervisors of San Diego County,* 144 Cal. App. 2d 274, 277, 300 P. 2d 882, 884.)

That classification of a district, as a matter of state law, as a "municipal corporation" or a "special assessment district," does not affect the constitutional right of a property owner to a hearing, on notice, before his land is included in the district, has been clearly recognized by the Supreme Court of Montana in a case identical with this action. In *Great Northern Ry. Co. v. Roosevelt County* (Mont., 1958), 332 P. 2d 50, the Montana Supreme Court held that a statute, providing for inclusion of real property in a fire protection district by order of the County Commissioners without notice to property owners affected, was invalid as being in derogation of the due process clause of the Fourteenth Amendment of the Federal Constitution. The Montana Court cited the recent decisions of your Honorable Court on the requirement of notice, in-

cluding *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306; *Covey v. Town of Somers*, 351 U. S. 141, 146; *Walker v. City of Hutchinson*, 352 U. S. 112, and *Lambert v. People of State of California*, 355 U. S. 225, as authority for its decision. The reasoning of the Court on this issue was set forth as follows (332 P. 2d 501, 506):

> 1. The property of the . . . . (*taxpayer*) . . ., including its lands and other property, is a legally protected interest.
>
> 2. The imposition of a special tax assessment adversely affects this legally protected interest.
>
> 3. Where notice is not required or given of proceedings adversely affecting this legal interest, due process has been denied under the . . . . (*State*) Constitution and the United States Constitution.
>
> 4. When required and given, notice must be such that it is reasonably calculated to apprise a person of proceedings adversely affecting his property interests; otherwise it denies him due process of law.
>
> 5. When property interests are adversely affected by proceedings that require no notice at all to the persons affected, the rule is still the same and it is just that much more obviously a *denial of due process.*

It is submitted that we have shown above that the Constitutional provisions on due process of law require that a property owner be granted a hearing, on notice, before a local tribunal, such as the Board of Supervisors, decides that his property shall be annexed to a special tax district. It is further submitted that the statutes of California on annexation to a County Fire Protection District, set forth in Health and Safety Code, Sections 14510 to 14515, in-

clusive, are designed to ensure this right of the property owner. (See App. "B" for text of code sections.)

The trial court and the District Court of Appeal have found that the order on annexation was entered without compliance with the statutory requirements as to notice and hearing. It is submitted that the trial court correctly found that the order on annexation of appellant's property was null and void, as having been entered in derogation of the requirements of the State statute. It is further submitted that if the statutes on annexation are construed, as has been done in this instance by the District Court of Appeal, so that an order of annexation may be entered by the Board of Supervisors without hearing the property owners or notice to them, then the statutes themselves are void as being in derogation of the provisions of the Federal Constitution on due process of law. As stated by the Supreme Court of Montana in an identical case, *Great Northern Ry. Co. v. Roosevelt County* (1958), 332 P. 2d 501, 506:

> ". . . Fine distinctions based on general taxing power cannot conceal the true facts. The denial of the opportunity to have notice of such special tax proceedings directly and adversely affecting the legally protected property interests of the respondent was a denial to it of due process of law. Any other conclusion is untenable."

**B. Due Process of Law Requires Notice of Any Hearing Which Is to Be Accorded Finality. Statute That Does Not Provide Reasonable Notice of Such Proceeding Is Invalid Under the Federal Constitution.**

It is submitted that we have shown above that the Constitutional provisions on due process of law require that a property owner have notice of a hearing on annexation of

his property to a special tax district. It is further submitted that they impose yet another requirement: That the notice of the hearing be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." This was clearly stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314, as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and accord them an opportunity to present their objections. . . . (*Citing cases.*) The notice must be of such nature as reasonably to convey the required information . . . (*citing cases*), and it must afford a reasonable time for those interested to make their appearance . . . (*citing cases*)."

That the notice published in the present instance did not satisfy the Constitutional requirements of due process was recognized by the District Court of Appeal, which stated in its opinion (App. "A") that the:

> ". . . notice published did not contain the names of the owners of the property within the District or the names of the persons to whom that property was assessed. The names of these persons were known and the places at which notice would reach them by mail was known. The property to be affected by the annexation was not described and the exterior boundaries of the proposed annexation were not such as to put an owner of property within the territory upon inquiry as to whether his property was within the

> property to be annexed. The newspaper chosen was not one of general circulation but one which had no regular subscribers and was not a publication designed to bring notice of the proceedings to those affected thereby. The notice given here was not one of a character designed to bring home to the persons affected knowledge of the proceedings or to put them upon inquiry but was apparently designed as a mere token compliance with the statute without regard as to whether it was in fact reasonably certain to inform those affected. Such notice does not comport with due process within the rationale of the recent decisions of the Supreme Court of the United States. (Citing cases.) . . ." (App. "A," pp. 8-9.)

It is submitted that the District Court of Appeal erred in refusing to recognize the principles stated in the "recent decisions" of this Court as being applicable in this instance, and in holding that they were only applicable in proceedings for annexation to public corporations classified by state law as "special assessment districts." That the Constitutional requirements of due process of law are not so limited is evident from the statement in *Mullane v. Central Hanover Bank and Trust Co., supra,* that notice is required in *"any* proceeding which is to be accorded *finality."* (Emphasis supplied.)

That a decision of the Board of Supervisors on the question of annexation is *final* is evident from the rule that it may be reviewed by the courts only to determine if the Board acted within its jurisdiction, and whether its finding is supported by substantial evidence. Moreover, the District Court of Appeal held that in this instance the decision was final, and not subject to judicial review, even

though the Board acted in excess of its jurisdiction and its decision was not supported by *any* evidence.

That the *Mullane* rule is not limited to certain types of proceedings has been recognized by the legal commentators; for instance, 36 *Iowa Law Review* (1950), p. 47; 37 *Iowa Law Review* (1951), pp. 74-84; 39 *Iowa Law Review* (1954), pp. 665-675; and 70 *Harvard Law Review* (1957), p. 1257, where at page 1267 it is said:

> ". . . it would seem that the continued use of minimal forms of notice will be permitted only if the need for such use clearly outweighs the interests of property owners in being notified in an effective manner."

That there is no need for the use of minimal forms of notice in this type of proceeding was recognized by the District Court of Appeal, which stated:

> ". . . That the Legislature does not consider it impractical to give written notice by mail to the owners of property within territory to be annexed whose names appear upon the assessment roll in addition to giving notice by publication is well illustrated by the provisions of section 35311 of the Government Code which require service by mail of such written notice in case of annexation to a city of uninhabited territory." (Opin., App. "A," p. 10.)

Obviously, if notice by mail is practical in proceedings for annexation to a full municipal corporation, such as a city, it is also practical in proceedings for annexation to a public corporation of limited powers, such as a County Fire Protection District.

That the Constitutional requirement of notice is not limited to certain types of proceedings, but extends to *any* proceeding which is to be accorded finality, is evident from

the statement of this Court in *Walker v. Hutchinson*, 352 U. S. 112, 115, that the *Mullane* decision "establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." The same rule was applied in *Covey v. Somers*, 351 U. S. 141, involving a municipal tax; *New York v. New York, New Haven and Hartford R. Co.*, 344 U. S. 293, involving a lien imposed for the benefit of a municipality, and *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948, involving a special assessment district. In these decisions, this Court has made no distinction as to whether the right to a hearing of proceedings which may directly and adversely affect legally protected interests is Constitutionally created or created by statute. As stated in a comment on the *Wisconsin Electric Power Co.* case on page 96 of the Municipal Law Service Letter, Committee Reports Supplement, Section of Municipal Law, American Bar Association (Nov., 1958): "If such rights and interests are created, notice reasonably calculated to inform is required by 'due process' as interpreted by the present United States Supreme Court."

It is submitted that the decision in the *Wisconsin Electric Power Co.* case is squarely in point in the action before this Court on appeal.

Here, as in the *Wisconsin* case, a local government proposes to levy an assessment on real property, and here, as in the *Wisconsin* case, the landowner alleges (1) that the property would not be benefited, (2) that landowner did not have actual notice of the proceeding, (3) that constructive notice by publication is inadequate to comply with the requirements of due process of law.

In the action now before this Honorable Court on appeal, the landowner, as in the *Wisconsin* case, prays for

a judgment that assessments levied pursuant to published notice only will be null and void, on the ground that the State statute authorizing published notice of the hearing on annexation is invalid as being in derogation of the Constitutional requirement of due process of law. It is submitted that under the authority of the *Wisconsin Electric Power* case, and the other decisions cited above, the state statute on these annexation proceedings is invalid.

**C. Validating Act Is Inapplicable in This Instance.**

The District Court of Appeal based its decision that the order of annexation was valid on the ground that

> "... as the legislature could have originally provided for an annexation without notice or hearing, the Validating Act of 1958 established the annexed territory as a part of the fire protection district and cured any defects as to notice or hearing in the proceedings." (App. "A," p. 13.)

It is submitted that the reasoning of the District Court is erroneous, and the Validating Act of 1958 is not applicable in this instance, for it is specifically provided in Section 6(b) of the Act that it, "... shall be limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions." It is evident that whether the Validating Act is applicable in the present action is dependent upon the construction of the Federal Constitution, and that this question can only be determined by your Honorable Court, rather than a state court, such as the District Court of Appeal of the State of California.

It is submitted that we have shown above that the due process clause of the 14th Amendment to the Federal Con-

stitution guarantees the right of a property owner to a hearing, on notice, of proceedings to annex his property to a Consolidated County Fire Protection District and, therefore, that the Validating Act of 1958 could not, and was not intended to, cure "any defects as to notice or hearing in the proceeding," and that the District Court of Appeal erred in holding said act applicable here.

Moreover, it is settled that a curative act cannot cure jurisdictional defects in the establishment of a special tax or assessment district, and thus authorize the taking of property without due process of law. (*Miller & Lux v. Board of Supervisors*, 189 Cal. 254, 275, 208 Pac. 304, 314; *People v. Van Nuys Lighting District*, 173 Cal. 792, 797, 162 Pac. 304, 314.) As stated in 37 *Iowa Law Review* (1951), 74, 80:

> ". . . The legislature may not, by retroactive legislation, confer jurisdiction on a court in such manner that the judicial act of the court done without jurisdiction becomes valid and not subject to collateral attack. Thus, the legislature could not declare in futuro a court to have jurisdiction on the basis of publication alone when better service is possible, and consequently such service is invalid retrospectively. . . ."

Nor is the Validating Act effective, in this instance, as a statute of limitations, for as stated in 37 *Iowa Law Review* (1951), 74, 80 and 81:

> ". . . The statute provides no further notice to the improperly served party, and since the notice upon which the judgment was premised did not meet the reasonableness test, proper notice is never given. Thus, the legislature is attempting to force litigants to come into court to protect some right, property or status without giving any notice. . . ."

Further, the Validating Act cannot be considered as an act *annexing* the territory to the Fire Protection District for; as stated in *Miller & Lux v. Board of Supervisors* (1922), 189 Cal. 254, 277, 208 Pac. 304:

> ". . . the conclusive presumption indulged in by the courts to the effect that the legislature had duly considered the benefits to be derived by the lands included within the district is hardly applicable when the legislature expressly adopts the findings of the board of supervisors as to benefits. . . ."

Finally, it is submitted that to apply the Validating Act in the present instance would be to deprive the appellant of the guarantee of "equal protection of the laws" as set forth in Section 1 of Amendment XIV, to the Constitution of the United States of America, and this for two reasons:

First, the opinion of the District Court states that the order of annexation was entered in excess of the power of the Board of Supervisors because of failure to comply with the provisions of the applicable statute as to notice and hearing. If the Validating Act is so applied that property owners who file suit at any time prior to thirty days from its effective date are entitled to a judgment that such orders are void, whereas those who file suit on the thirty-first or, as in this instance, the thirty-seventh day, are barred from judicial relief, it is submitted that the Validating Act itself is void as being arbitrary and unreasonable. (See: *Ettor v. City of Tacoma, et al.*, 228 U. S. 148.)

Secondly, to construe the Validating Act as depriving appellant of the right to judicial relief would deprive appellant of property without affording it an opportunity to be heard in its defense.

. It is the law of California that existing administrative remedies must be exhausted before a party is entitled to seek judicial review. (*Abelleira v. Dist. Court of Appeal*, 17 Cal. 2d 280, 292, 109 P. 2d 942, 949; *Childs v. State Personnel Board*, 97 Cal. App. 2d 467, 218 P. 2d 52.) When the appellant herein filed its petition with the Board of Supervisors on December 24, 1957, an adequate administrative remedy existed, for the Board had the power to exclude the property of appellant on the ground that it did not benefit from inclusion in the District. (Health and Safety Code, Sec. 58230.) Although the administrative remedy would not be adequate, after the first Monday in March, 1958, when the lien attached for payment of the special tax levied by the Fire Protection District (Rev. and Tax. Code, Sec. 2192), unless the Board of Supervisors had the power to declare its order of annexation null and void, appellant did not have the right to seek judicial review until the Board ruled on that issue on April 7, 1958, for by the law of California a party cannot request judicial relief until the administrative remedy has been completed. (*Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 296, 109 P. 2d 942; see, also, *Southland Industries v. Federal Communications Comm.*, 99 F. 2d 117.)

The Validating Act specifically states that it shall not operate to validate ". . . any act, proceeding or other matter the legality of which is being *contested* or *inquired into* in any *legal proceeding* now pending and undetermined. . . ." (Emphasis ours.) It is submitted that, in construing the term "legal proceeding" to exclude the petition filed by appellant with the Board of Supervisors, the District Court of Appeal has deprived the appellant of property without affording it, at any time, an opportunity

to be heard in its defense. It is settled that the Federal constitutional guarantee of due process extends to state actions through its judicial, as well as through its legislative, executive or administrative branches of government. (*Ownbey v. Morgan*, 265 U. S. 94, 111.) As stated by your Honorable Court in *Brinkerhoff-Faris Trust & Savings Co. v. Hill, et al.*, 281 U. S. 673, 682:

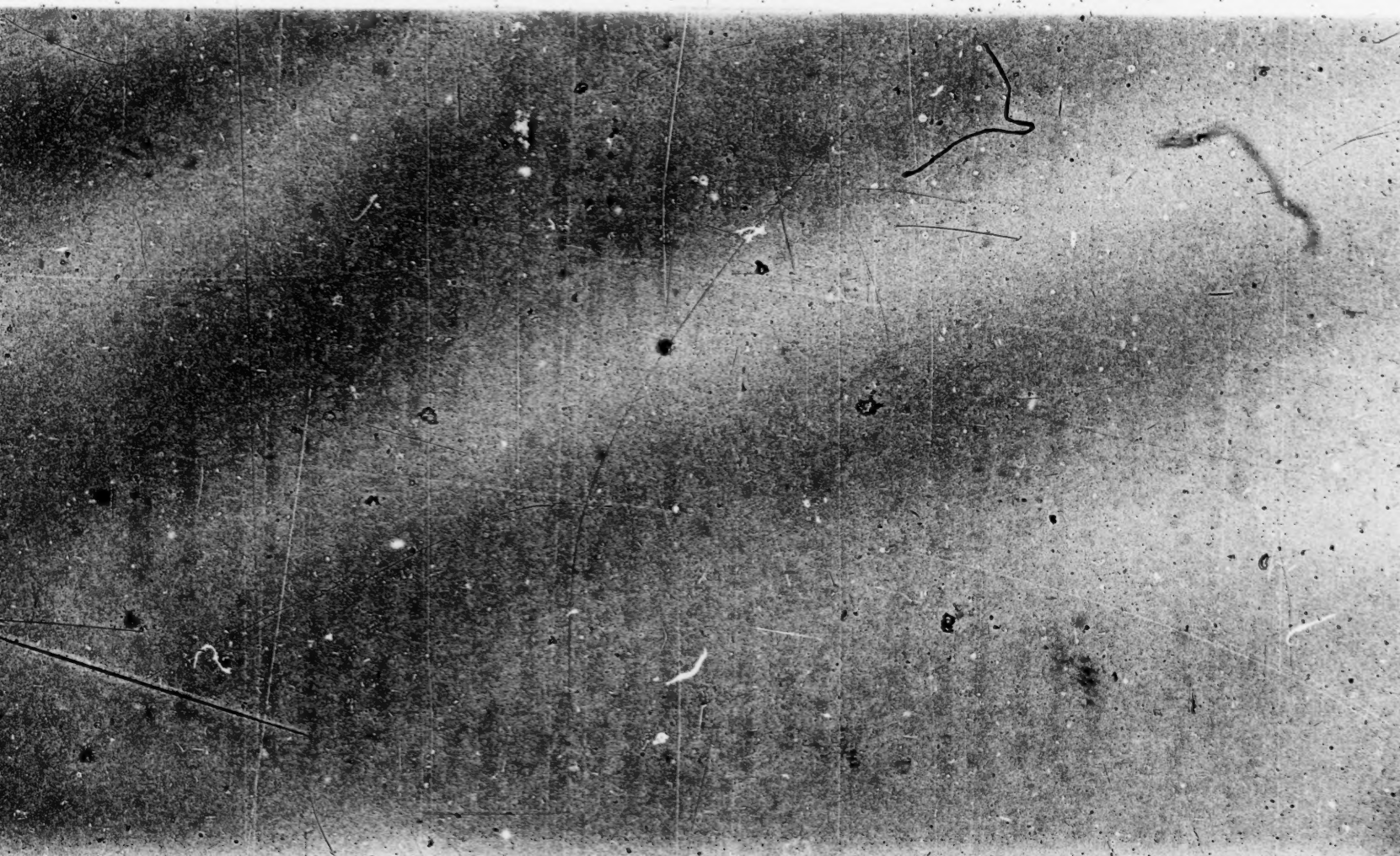
> "... Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, accorded to him some real opportunity to protect it. ..."

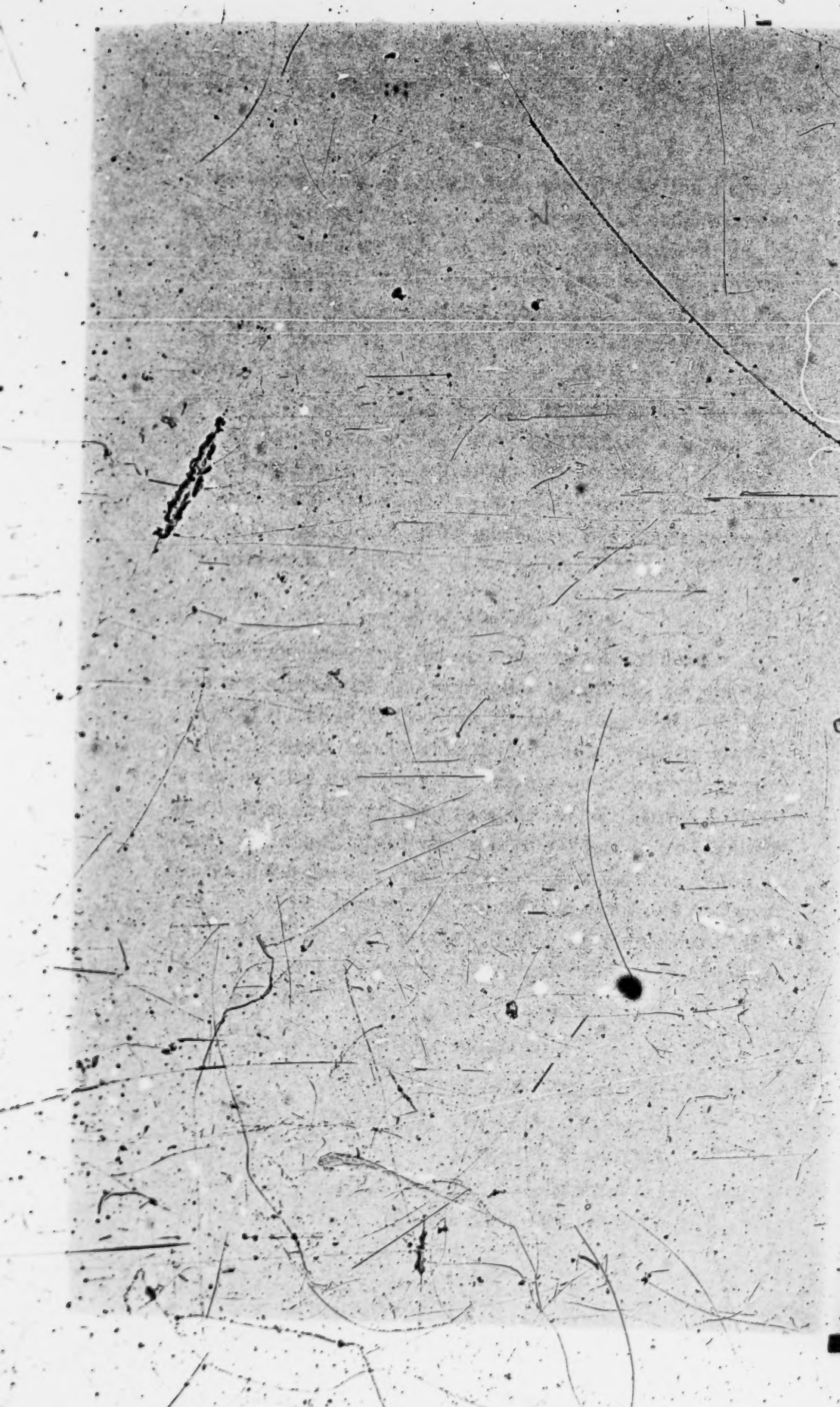
## Conclusion.

It is submitted that the questions presented by this appeal are substantial and of public importance, for the decision of the District Court of Appeal of the State of California, Second Appellate District, that a property owner is not entitled to notice or a hearing on a proceeding for annexation of his property to a special tax district, is contrary to the holding of the Supreme Court of the United States in the cases of *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306; *Walker v. City of Hutchinson*, 352 U. S. 112, and *Wisconsin Elec. Power Co. v. Milwaukee*, 352 U. S. 948.

Respectfully submitted,

TRIPPET, YOAKUM & BALLANTYNE,
By OSCAR A. TRIPPET, and
THOMAS H. CARVER,
*Attorneys for The Firestone Tire and Rubber Company, Appellant.*





## APPENDIX "A."

### Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

The Firestone Tire & Rubber Company, a corporation, Petitioner and Respondent, vs. Board of Supervisors of Los Angeles County, Burton Chace, Chairman, Warren Dorn, John Anson Ford, and Kenneth Hahn, Consolidated County Fire Protection District and Keith Klinger, Appellants. Civil No. 23433.

The Firestone Tire & Rubber Company, a corporation, Petitioner, vs. Board of Supervisors of Los Angeles County, Burton Chace, Chairman, Warren Dorn, John Anson Ford, and Kenneth Hahn, Consolidated County Fire Protection District and Keith Klinger, Respondents. Civil No. 23365.

Filed Dec. 23, 1958.

No. 23433. Appeal from a judgment of the Superior Court of Los Angeles County. Arthur Crum, Judge. Reversed.

No. 23365. Petition for Writ of Prohibition. Granted.

For Board of Supervisors: Harold W. Kennedy, County Counsel and David D. Mix, Deputy County Counsel.

For Firestone Tire & Rubber Company: Trippet, Yoakum, Stearns & Ballantyne, Oscar A. Trippet and Thomas H. Carver.

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The first matter named in the caption involves an appeal by Consolidated Fire Protection District, hereinafter called "District," the Board of Supervisors of the County

of Los Angeles and one Keith Klinger who is the chief engineer of the District, from a judgment annulling a resolution of the Board of Supervisors annexing certain territory to the District in a proceeding known as Annexation 47-57.

The second matter named in the caption involves a petition by Firestone Tire and Rubber Company, a corporation, hereinafter called Firestone, for a writ of prohibition, directed to the Board to enjoin it from taking further action under a proceeding known as Annexation Number 34-58, by which proceeding it is sought to annex to the District the same territory which was included in Annexation Number 47-57, which proceeding was annulled by the judgment appealed from.

We have permitted these two matters to be submitted for decision upon a combined record and briefs and we will dispose of both by this opinion treating them separately.

## The District's Appeal

We have before us, in addition to the appeal, the motion of Firestone to dismiss the appeal. The motion is made upon two grounds. The first ground is that by the commencement of proceeding 34-58 the appellants have accepted the benefits of the judgment appealed from and thereby affirmed the validity of that judgment and waived their right to appeal therefrom. This contention is devoid of merit. Undoubtedly if appellants are correct in their contention that the judgment appealed from is erroneous and as a matter of law the original proceedings were valid, the Board did not have the power to act under the later proceedings for it could not order annexed territory which was already a part of the District. If, however, the

Board's contentions on the appeal are not well founded and the judgment of the trial court is correct, then the original proceedings were no bar to the second. (City of San Pablo v. City of Richmond, 148 Cal. App. 2d 358 at 361-2.)

The appellants by initiating the second proceedings did not concede the invalidity of the first proceeding and were entitled as a precautionary measure to commence a second proceeding which would be effective only in the event that the judgment of the lower court was affirmed. If appellants had proceeded to complete their annexation under the second proceeding then it might be doubtful that they would be in a position to attack the first judgment for it would only be upon the basis of the invalidity of the order annulled by the judgment that they could again act to annex the same territory.

The second ground of the motion is that by instituting the second proceeding, the appellants have violated an order made by the lower court staying proceedings and therefore are in contempt of that court and not entitled to seek aid from this court by their appeal. This contention is also without merit. The stay order made by the superior court in connection with a writ of review issued by it only stayed action by the respondents in that court (appellants here) upon the proceedings to be reviewed by that court. It did not purport to enjoin the Board of Supervisors or the District from instituting new and separate annexation proceedings. The motion to dismiss is denied.

Firestone has also moved for an affirmance of the judgment upon the grounds that a mere inspection of the record indicates the correctness of the trial court's judgment. This motion goes to the merits of the appeal and is disposed of by our decision.

## The Facts

The facts relevant to the disposition of the appeal are: The District is a duly organized fire protection district. The Board of Supervisors of Los Angeles County is the governing board of that district. On July 9, 1957, at a regular meeting of the Board, it determined that certain territory should be annexed to the District and ordered a hearing had in the matter of the proposed annexation on Thursday, August 8, 1957. It directed the clerk of the Board to publish a notice once a week for two successive weeks in the Florence Messenger, which the Board found to be a newspaper circulated in the territory proposed to be annexed and the newspaper which the Board determined most likely to give notice to the inhabitants of said territory. A notice was published as directed in the designated newspaper. This notice did not name any person, and the boundaries of the territory to be annexed were described as follows: "Beginning at the most westerly northwesterly corner of Tract No. 3233, as shown on map recorded in Book 36, Page 70 of Maps, in the office of the Recorder of the County of Los Angeles; thence northerly along the boundary of Consolidated County Fire Protection District, as same existed on May 29, 1957, and following the same in all its various courses and curves to the boundary of the City of South Gate, as same existed on said date; thence northerly in a direct line to the point of beginning. Containing: 0.079 square miles."

Firestone is the owner and occupant of all but a small portion of the real property within the territory sought to be annexed and maintains a large manufacturing plant thereon. The fact of its ownership and occupancy were known to the Board and to the officers of the District.

On August 8, this annexation proceeding together with 12 other proposed annexations were taken up by the Board for action. No one appeared at the meeting to protest any of the annexations. The Board thereupon took the evidence of one Hughes, a fire rating inspector for the county, his evidence being as follows: "Q. Are you familiar with the territory sought to be annexed to the various Fire Protection Districts? A. I am. Q. In each instance, in your opinion would the territory [proposed to be annexed] be benefited by the annexation if consummated? A. It would." The Board thereupon adopted the resolution for the annexation of the territory in question and the Board thereafter, pursuant to section 14480 Health & Safety Code, levied an ad valorem tax upon the property of Firestone.

Firestone had no knowledge of the proposed annexation and did not acquire any knowledge of the proceeding until after the resolution of annexation had been passed and the tax assessed. It then filed a petition with the Board requesting the withdrawal of the territory included within the annexation from the District upon two grounds: First, that the annexation proceedings were invalid, and, second, that Firestone would receive no benefit from the annexation. Proceedings upon this petition were had before the Board at a number of meetings thereof and at the fourth meeting at which the matter was considered, held on April 17, 1958, the hearing upon the request of counsel for Firestone was continued for a period of 90 days in order that Firestone might commence an action to test the validity of the initial annexation.

On April 7, 1958, the Legislature passed an act validating all annexation proceedings theretofore completed other than those as to which any legal proceeding was at

the effective date of the act pending and undetermined or which might be pending or undetermined during a period of 30 days from and after the date of the act. This act was effective as of April 7, 1958. (See Statutes 1958, First Extraordinary Session, Chapter 10.)

On May 14, 1958, Firestone filed its petition for writ of certiorari and writ of mandate in the present action.

At the trial of the action the evidence received showed without substantial conflict that the Florence Messenger in which the notice of annexation was published, was a publication which had no subscribers but was distributed by being delivered gratis to habitations and places of business within a defined area outside of the territory sought to be annexed and that it was not circulated or distributed within that territory. The evidence further showed that the boundaries of the Consolidated County Fire Protection District referred to in the published notice of the territory to be annexed, were not a matter of public record and that the only means that a property owner would have of determining whether the boundaries of the territory to be annexed as given in the published notice encompassed his property would be to, with the aid of the county engineer, search the minutes of the Board of Supervisors so as to ascertain the boundaries of the District as those were contained in numerous proceedings for annexations to the original District or for the consolidation of that district with other districts.

The trial court found that the Florence Messenger was not, at the time of the publication of the notice of annexation, circulated or distributed in the territory proposed to be annexed; that it was not the newspaper most likely to give notice to the inhabitants of the territory proposed to be annexed (the evidence showed that five newspapers of

general circulation were distributed in the area); that Firestone had no notice whatsoever of the proposed hearing on the annexation or of the proposed annexation and that the notice as published failed to designate the property proposed to be annexed. It concluded that the Board acted without and in excess of its jurisdiction and that the resolution authorizing the annexation of the territory in question was void. It rendered judgment accordingly.

The findings of fact made are, as we have indicated, fully supported by the evidence.

The power of the Board to act upon the annexation proceedings was dependent upon substantial compliance with the provisions of the statute as to notice and hearing. The statute was the measure of its power. (Williams v. Bergin, 108 Cal. 166 at 170; Keller v. City of Oakland, 54 Cal. App. 169, 172.) The notice here was vitally defective as a statutory notice. It was defective as a notice complying with the statute because not published in a newspaper distributed within the territory to be annexed. It was defective as a statutory notice because the description was not one which would put a person reading it upon notice that his property was within the boundaries as described. It is evident from the mere reading of the description that no one reading the notice would have any cause to believe that his property fell within the exterior boundaries described nor could he by reference to monuments or records, reference to which is ordinarily made in the description of real property, have applied the description so as to determine whether his property was affected but could only ascertain this by an independent search of records that were only available through the assistance of a public officer. Such description, in our opinion, does not meet the requirement of section 14513 of

the Health & Safety Code that the notice "shall designate the territory proposed to be annexed."

The judgment of the trial court must therefore be affirmed unless the Validating Act of 1958 (Stats. 1958 First Extraordinary Session, Chapter 10) validated the annexation.

The Validating Act could not and does not purport to validate any ordinance or resolution which is void because of lack of due process, but only ordinances or resolutions which are invalid because of defects or omissions in carrying out statutory provisions which the Legislature could have omitted from the law under which such ordinance or resolution was adopted or the proceeding had. (See Section 6(a) and (b) Validating Act of 1958, First Extraordinary Session, Chapter 10; Miller v. McKenna, 23 Cal. 2d 774 at 782.)

If the owner of property within the proposed annexation had a constitutional right to notice and an opportunity to be heard, the notice herein given did not satisfy the constitutional requirements of due process. Here notice published did not contain the names of the owners of the property within the District or the names of the persons to whom that property was assessed. The names of these persons were known and the places at which notice would reach them by mail was known. The property to be affected by the annexation was not described and the exterior boundaries of the proposed annexation were not such as to put an owner of property within the territory upon inquiry as to whether his property was within the territory to be annexed. The newspaper chosen was not one of general circulation but one which had no regular subscribers and was not a publication designed to bring notice

of the proceedings to those affected thereby. The notice given here was not one of a character designed to bring home to the persons affected knowledge of the proceedings or to put them upon inquiry but was apparently designed as a mere token compliance with the statute without regard as to whether it was in fact reasonably certain to inform those affected. Such notice does not comport with due process within the rationale of the recent decisions of the Supreme Court of the United States. (See Mullane v. Central Hanover B. & T. Co., 339 U. S. 306, 94 L. Ed. 865 at 874-76; Walker v. Hutchinson, 352 U. S. 112, 1 L. Ed. 2d 178 at 181-82; Wisconsin Electric Power Co. v. City of Milwaukee, 352 U. S. 948, 1 L. Ed. 2d 241.)[1] The rationale of these decisions, as we understand it, is that in order to comport with due process a notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests and that a newspaper publication alone is not adequate where the person affected is known and it

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[1]Appellant has directed our attention to certain earlier decisions of the Supreme Court of the United States holding that notice by publication is sufficient to constitute due process, to-wit: Wight v. Davidson, 181 U. S. 371, 45 L. Ed. 900; Paulsen v. City of Portland, 149 U. S. 30, 37 L. Ed. 637; Lent v. Tillson, 140 U. S. 316, 35 L. Ed. 419; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. Ed. 369, and contends that as those cases are not referred to in the cases we have cited, it was not the intent of the Supreme Court to over-rule them. We are of the opinion, however, that the Supreme Court has by its later decisions, further defined those matters *which do not constitute due process*. We think this is emphasized by the fact that the cases of Wight v. Davidson, *supra*, and Walker v. Hutchinson, *supra*, both involved condemnation proceedings in which the notice was given by publication and that while in the Wight case the Court upheld publication as due process, in the Hutchinson case it emphatically announced the contrary. It may be further noted that in his dissent in the Hutchinson case, Justice Burton directed attention to earlier decisions of the Court in which it had been held that notice by publication comported with due process.

is feasible to give him notice by personal service or by mail or if his address be unknown, by posting his property. It is common knowledge[2] that a land owner is rarely informed of proceedings against his property by mere newspaper publication and to assert that the notice as published here was reasonably calculated to inform Firestone of the proceedings is the purest sophistry.

Appellant urges upon us the impracticability in many proceedings of giving notice in any other manner than by publication. It may be that in certain proceedings notice by mail to or by personal service on all affected persons might be impractical or even impossible. We are not concerned with such a situation here and if one should arise then the character of the notice given and the likelihood of its being reasonably certain to inform those affected under the conditions which then exist may be examined to determine whether in that case they constituted due process. (See Mullane v. Central Hanover B. & T. Co., 339 U. S. 306, 94 L. Ed. at 874.) That the Legislature does not consider it impractical to give written notice by mail to the owners of property within territory to be annexed whose names appear upon the assessment roll in addition to giving notice by publication is well illustrated by the provisions of section 35311 of the Government Code which require service by mail of such written notice in case of annexation to a city of uninhabited territory.

The question of due process only presents itself, however, if the proceeding is one through which a person affected may thereby be deprived of property or a property right. Whether the annexation in question here is one through which Firestone is deprived of its property

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[2]Walker v. Hutchinson, 1 L. Ed. 2d at 182.

depends upon the nature of Fire Protection Districts. If they are but public corporations formed as an agency of the State with limited powers to perform a function of the State, i.e., are public corporations in the nature of municipalities, then the annexation of territory does not deprive the owners of the property annexed of that property or of any interest therein or charge them with the payment of any assessment for the benefit of other persons within the territory annexed, and they are not, as a matter of constitutional right, entitled to notice or hearing. If, on the other hand, the District is in the nature of a special assessment district created for the primary purpose of assessing upon private lands the benefits to be derived from a public improvement for the construction of which the district is formed, persons whose lands are within the proposed district are deprived of their property without due process of law unless they have proper notice and an opportunity to be heard upon the question of whether their property will benefit and if so the extent of those benefits. (In re Orosi Public Utility Dist., 196 Cal. 43; People v. Town of Ontario, 148 Cal. 625; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. Ed. 369.)

No citation of authority is needed for the proposition that the furnishing of fire protection is a function of the government of the State to be performed by it in unincorporated territory and that it may by general law provide for the formation of municipal corporations with limited powers to perform that function. Appellant District is such a municipal corporation. Its powers are limited to the furnishing of fire protection to and the elimination of fire hazards in the territory within its boundaries. (Sec. 14440 Health & Safety Code.) It may acquire the property necessary for the exercise of its limited power but

title to that property vests in the county. (§14500.) It may, with the consent of the electors residing within its boundaries, issue bonds payable solely out of revenues derived from taxation of the property within the district and must each year levy an *ad valorem* tax upon all taxable property, real and personal, within the district sufficient to defray the cost of operation and maintenance and to pay the principal and interest upon any bonds that may be issued. It has no power, however, to erect any public improvement and to make an assessment therefor, based upon the benefits conferred thereby, against any property in the district. The annexation of property to a Fire Protection District does not therefore deprive the owners of the property within the annexed territory of any property or impose upon them liability for any public improvement but only renders their property subject to a general *ad valorem* tax which is levied on all property in accordance with its value and irrespective of the benefits conferred. This tax is of no different effect from that of any tax levied by a city for general municipal purposes. (*In re* Orosi Public Utility Dist., 196 Cal. 43.)

The Legislature, therefore, without violating any constitutional provisions, might have omitted from the act any provision for notice or hearing and empowered the Board to initiate and complete the annexation without notice. (*In re* Orosi Public Utility Dist., 196 Cal. 43; People v. Town of Ontario, 148 Cal. 625.)

Our attention has been directed to Norman v. Cogswell, 82 Cal. App. 159, in which the court stated that a fire protection district compares "logically with an assessment district for a certain definite and particular improvement." We believe that the language used by the court there was not necessary to its decision and the Supreme Court, without mention of Norman v. Cogswell, in

Johnson v. Fontana County F. P. Dist., 15 Cal. 2d 380, arrived at the opposite conclusion stating: "There is not much similarity between such a district [a fire protection district] and an assessment district which carries on no continuous function and exists solely for the purpose of paying for a public improvement. In a very real sense the district is not only performing functions but performing a well-recognized governmental function in furnishing protection against fire."

It follows that as the Legislature could have originally provided for an annexation without notice or hearing the Validating Act of 1958 established the annexed territory as a part of the fire protection and cured any defects as to notice or hearing in the proceedings.

Firestone asserts that the petition filed by it with the Board after the completion of the annexation proceedings and after the assessor had levied an assessment for district taxes upon the subject property constituted legal proceedings contesting the legality of the annexation proceedings and that therefore by section 6(c) of the 1958 Validating Act the annexation proceedings in question were not included within the validating provisions of the act. With this contention we cannot agree. While the Board acted in a quasi-judicial capacity in conducting the hearing had on August 8th when it concluded that hearing and adopted its resolution for the annexation of the property, it exhausted its judicial powers. (Williams v. Bergin, 108 Cal. 166 at 170; see also Olive Proration Etc. Com. v. Agric. Etc. Com., 17 Cal. 2d 204 at 209; Heap v. City of Los Angeles, 6 Cal. 2d 405 at 407; Vernon v. Board of Supervisors, 142 Cal. 513 at 516.) The only judicial power conferred upon the Board which it might

exercise after the completion of the annexation was the power to act upon a petition to withdraw property from the district and if it found as a fact that the territory sought to be withdrawn could not benefit by remaining in the district to grant the petition and exclude the subject territory from the district but if it failed to so find to deny the petition. Health & Safety Code, §§14560-14567.) Such a proceeding is clearly not one contesting or inquiring into the legality of the original proceedings but is one dependent upon the legality of those proceedings, for otherwise the Board would have no power to act to grant a withdrawal. Firestone by its petition to the Board sought withdrawal of its property upon the grounds that its property would not benefit by remaining as a part of the district. It thus invoked a power of the Board which the Board could only have if its original proceedings were valid, and the fact that Firestone also sought to have the Board declare its original proceedings void does not turn the matter into a legal proceeding attacking and contesting the validity of the annexation for the Board had no power to make such an adjudication but was limited to a determination of the question as to whether Firestone's property would benefit by remaining a part of the district. It undoubtedly was the intent of the Legislature under paragraph (c) of section 6 of the Validating Act of 1958 to only exclude annexation proceedings which were being contested or inquired into in a proceeding before a court having the power to render a final judgment decreeing the invalidity of the proceedings. (Cf. Griem v. Fidelity & Casualty Co., 75 N. W. 67.)

The trial court was therefor in error in decreeing that the annexation proceedings in question were invalid. The

judgment is reversed with directions to the trial court to enter a judgment decreeing that the annexation proceedings known as Annexation 47-57 are valid, and that the lands of Firestone as those lands are described in its complaint on file in this matter are within the boundaries of the Consolidated Fire Protection District.

THE WRIT OF PROHIBITION, Civil No. 23365.

Inasmuch as we have held that Annexation proceedings 47-57 are valid and as by that proceeding Firestone's lands became part of the Consolidated Fire Protection District the respondent Board of Supervisors has no power to act upon any further proceedings for the annexation of the same lands and if it should attempt to do so it would be acting in excess of its jurisdiction. The writ prayed for must therefore issue.

Let a peremptory writ of prohibition issue.

NOURSE, *J. pro tempore.*

We concur:

SHINN, *P. J.*

VALLÉE, *J.*

## APPENDIX "B."

### Applicable Statutes of the State of California.

HEALTH AND SAFETY CODE OF THE STATE OF CALIFORNIA, Division XII: Fires and Fire Protection; Part 3: Fire Protection Districts; Chapter 2: County Fire Protection Districts; Article 9: Annexation:

Section "14510. At any time after the establishment of a district the board may determine that territory, whether or not it is contiguous to the district, should be annexed to the district. Any territory so annexed shall include all of the real estate and improvements of the parcel involved." (Statutes of California, 1939, Chapter 60, page 850; as amended by Statutes of California, 1949, Chapter 544, page 946, adding the second sentence.)

Section "14511. The board shall fix a time and place for the hearing of the matter of the annexation and shall direct its clerk to publish a notice once a week for two successive weeks in a newspaper circulated in the territory which it is proposed to annex which the board deems most likely to give notice to the inhabitants of the territory." (Statutes of California, 1939, Chapter 60, page 850.)

Section "14512. The notice shall be headed 'Notice of the proposed annexation of territory to the..... county fire protection district in.....county,' stating the name of the district and county, and shall contain a statement of the time and place for hearing on the matter." (Statutes of California, 1939, Chapter 60, page 850.)

Section "14513. The notice shall designate the territory proposed to be annexed.' (Statutes of California, 1939, Chapter 60, page 850.)

Section "14514. At the time and place of hearing, or at any time to which it is continued, the board shall hear any person objecting to the annexation or objecting to the annexation of any portion of the territory." (Statutes of California, 1939, Chapter 60, page 850.)

Section "14515. At the conclusion of the hearing the board may refuse to annex any territory to the established district or it may include all or a portion of the territory proposed to be annexed. If the board determines to annex any territory it shall so declare by resolution and thereupon the territory is annexed to the district for all purposes of this chapter." (Statutes of California, 1939, Chapter 60, page 850.)

Section "14516. Liability of annexed territory for taxes to pay bonds. Property in territory annexed to the district shall, from and after the date of such annexation, be subject to tax, levied as provided in Section 14480.2, to pay the principal of and interest on bonds issued for the account of the district outstanding at the time of such annexation." (Statutes of California, 1949, Chapter 741, page 1362.)

## FIRST VALIDATING ACT OF 1958

### Chapter 10

### Assembly Bill No. 13

An act to validate the organization boundaries, acts, proceedings and bonds of public bodies, as herein defined, and to provide limitations of time within which actions may be commenced in connection therewith, declaring the urgency thereof, to take effect immediately.

*The people of the State of California do enact as follows:*

Section 1. The following terms shall have the following meanings herein:

(a) The term "public body" means counties, cities and counties, cities, and the following districts, authorities, agencies, boards, commissions (and other entities):

Agencies, boards, commissions or entities constituted or provided for under or pursuant to Chapter 5, Division 7, Title 1 of the Government Code

Air pollution control districts
Airport districts
Assessment districts
Bridge and highway districts
Cemetery districts
Citrous pest control districts
Community service districts
Conservancy districts
County fire protection districts
County maintenance districts
County power pumping districts
County sanitation districts

County sewerage and water districts
County water authorities
County water districts
County waterworks districts
Drainage districts
Fire protection districts
Flood-control districts
Garbage and refuse disposal districts
Garbage disposal districts
Harbor districts
Harbor improvement districts
Highway districts
Highway lighting districts
Horticultural protection districts
Horticultural development districts
Irrigation district distribution districts
Irrigation district improvement districts
Irrigation districts
Joint harbor improvement districts
Joint highway districts
Joint municipal sewage disposal districts
Junior college districts
Levee districts
Library districts
Local health districts
Local hospital districts
Metropolitan water districts
Mosquito abatement districts
Munjcipal improvement assessment districts
Municipal port districts
Municipal sewer districts
Municipal utility districts
Municipal water district improvement districts

Municipal water districts of any kind
Parking authorities
Parking districts
Park, recreation and parkway districts
Permanent road divisions
Pest abatement districts
Port districts
Public cemetery districts
Public utility districts
Reclamation districts
Recreational harbor districts
Recreation, park and parkway districts
Redevelopment agencies
Regional park districts
River port districts
Road districts
Sanitary districts
Sanitary districts annexed areas
School districts of any kind or class
Separation of grade districts
Sewer maintenance districts
Soil conservation districts
Storm water districts
Transit districts
Unified air pollution control districts
Vehicle parking districts
Veterans' memorial districts
Water conservation districts
Water districts
Water storage districts
Weed abatement districts
Zones of flood control districts

The term "public body" and the plural thereof, as used in this act, shall include only those entities which are specifically enumerated in this section.

(b) The term "bonds" means all instruments evidencing an indebtedness of a public body incurred or to be incurred for any public purpose, and all instruments evidencing the borrowing of money in anticipation of taxes, revenues or other income of such body, and all instruments payable from revenues or special funds of such public bodies, and all instruments funding or refunding any thereof or any indebtedness.

Sec. 2. All public bodies heretofore organized or existing under, or under color of, any law are hereby declared to have been legally organized and to be legally functioning as such public body. Every such public body shall have all the rights, powers, and privileges, and be subject to all the duties and obligations of such a public body regularly formed pursuant to law.

Sec. 3. The boundaries of every public body as heretofore established, defined, or recorded, or as heretofore actually shown on maps or plats used by the assessor, are hereby confirmed, validated, and declared legally established.

Sec. 4. All acts and proceedings heretofore taken by any public body under any law, or under color of any law, for the annexation or inclusion of territory into any such public body or for the annexation of any such public body to any other such public body or for the withdrawal or exclusion of territory from any such public body are hereby confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of such public body and of any person, public

officer, board or agency heretofore done or taken upon the question of the annexation or inclusion or of the withdrawal or exclusion of such territory.

Sec. 5. All acts and proceedings heretofore taken by or on behalf of any public body under any law, or under color of any law, for the authorization, issuance, sale, or exchange of bonds of any such public body for any public purpose are hereby confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of such public body and of any person, public officer, board or agency heretofore done or taken upon the question of the authorization, issuance, sale, or exchange of such bonds.

All bonds of any public body heretofore issued shall be, in the form and manner in which issued and delivered, the legal, valid and binding obligations of the public body. All such bonds heretofore authorized to be issued and hereafter issued and delivered in accordance with such authorization shall be the legal, valid and binding obligations of the public body. Whenever an election has heretofore been called for the purpose of submitting to the voters of any public body the question of issuing bonds for any public purpose, such bonds, if hereafter authorized by the required vote and in accordance with the proceedings heretofore taken, and issued and delivered in accordance with such authorization shall be the legal, valid and binding obligations of the public body.

Sec. 5.5. Notwithstanding the provisions of subdivision (c) of Section 6 of this act, all contracts entered into prior to September 7, 1955, between any city and a subdivider or between any county and a subdivider providing for reimbursement to the subdivider for construction of a lateral or other facility for storm water drainage or other

drainage are hereby confirmed and validated and declared to be legal and binding contracts between the parties thereto.

Sec. 6. (a) The foregoing provisions of this act shall operate to supply such legislative authorization as may be necessary to validate any such acts and proceedings heretofore taken which the Legislature could have supplied or provided for in the law under which such acts or proceedings were taken.

(b) The foregoing provisions of this act shall be limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions.

(c) The foregoing provisions of this act shall not operate to confirm, validate, or legalize any act, proceeding, or other matter the legality of which is being contested or inquired into in any legal proceeding now pending and undetermined or which may be pending or undetermined during the period of 30 days from and after the effective date of this act, and shall not operate to confirm, validate, or legalize any act, proceeding, or other matter which has heretofore been determined in any legal proceeding to be illegal, void or ineffective.

(d) This act shall not operate to confirm, validate, or legalize a contract between any district and the United States.

Sec. 7. Any action or proceeding contesting the validity of any action or proceeding heretofore taken under any law, or under color of any law, for the formation, organization or incorporation of any public body, or for any annexation thereto, exclusion therefrom or other change of boundaries thereof, or for the authorization, issuance,

sale or exchange of bonds thereof upon any ground involving an alleged defect or illegality not effectively validated by the prior provisions of this act and not otherwise barred by any statutes of limitations or by laches must be commenced within six months of the effective date of this act; otherwise each and all of said matters shall be held to be valid and in every respect legal and incontestable. This subsection shall not extend the period in which any action may be brought beyond the period in which it would be barred by any presently existing valid statute of limitations.

Sec. 8. Nothing contained in this act shall be construed to render the creation of any city or district, or any change in the boundaries of any city or district, effective for purposes of assessment or taxation unless the statement, together with the map or plat, required to be filed under Sections 54900 to 54904, inclusive, of the Government Code, is filed within the time and substantially in the manner required by said sections.

Sec. 9. As used in this act, the word "now" means the date this act takes effect; the word "heretofore" means any time prior to such effective date; and the word "hereafter" means any time subsequent to such effective date.

Sec. 10. This act may be cited as the First Validating Act of 1958.

Sec. 11. [Urgency measure]

Approved and filed April 7, 1958.

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DEC 4 1959
JAMES R. BROWNING, Clerk

No. 110

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

THE FIRESTONE TIRE & RUBBER COMPANY, *Appellant*

v.

BOARD OF SUPERVISORS OF LOS ANGELES COUNTY, BURTON CHACE, CHAIRMAN, FRANK BONELLI, WARREN DORN, JOHN ANSON FORD AND KENNETH HAHN, CONSOLIDATED COUNTY FIRE PROTECTION DISTRICT, AND KEITH KLINGER

**Appeal From the District Court of Appeal of the State of California, Second Appellate District**

## PETITION FOR REHEARING

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---

**Appeal From the District Court of Appeal of the State of California, Second Appellate District**

---

## PETITION FOR REHEARING

---

The appeal in this cause was dismissed and *certiorari* denied by an order of this Court entered on October 12, 1959. On October 23, 1959 the time within which to petition for rehearing was extended to and including December 4, 1959. This petition is filed pursuant to Rule 58-1 of the Rules of this Court.

## JURISDICTION

The absence in this Court's order of dismissal of any statement of grounds or citation of authority makes it impossible for appellant to ascertain the basis upon which appellate jurisdiction of this cause was found wanting. It may be that the Statement as to Jurisdiction failed to spell out with sufficient particularity the basis upon which appellate jurisdiction is believed to rest; accordingly, a more detailed showing as to jurisdiction is set forth below.

Appellant duly raised and preserved the constitutional question in the trial court (Juris. Statement 8), in the District Court of Appeal and in the Supreme Court of California.[1] The pertinent holdings of the District Court of Appeal (the highest California court which heard the case) were as follows:

> 1. The proceedings leading to the annexation of appellant's land to a county fire protection district were unlawful under the then applicable state statute, as a result of "vitally defective" notice (Juris. Statement App. "A" 7).
>
> 2. A subsequent general validating statute sought to be applied here is limited by its terms to annexations not originally void under the Constitution of the United States (Juris. Statement App. "A" 8).
>
> 3. The notice by publication in the instant annexation proceedings "does not comport with due

[1] See Appellant's briefs in the District Court of Appeal (Brief in Support of Motion for Summary Affirmance 24, 25, 26-29, 39; Reply Br. 5-11, 49-53, 71-75; Pet. for Rehearing 7-11, 21-25) and the Petition for Hearing in the California Supreme Court (pp. 18-22, 25-27).

process within the rationale of the recent decisions of the Supreme Court of the United States"[2] (Juris. Statement App. "A" 9).

4. The validating statute nevertheless operated to legalize the defective annexation because, in the circumstances, there was no constitutionally protected right under the Due Process Clause of the Fourteenth Amendment to *any* notice prior to annexation (Juris. Statement App. "A" 10-13).

Thus the First Validating Act of 1958 was applied in a manner contended by appellant to render it repugnant to the Due Process Clause of the Fourteenth Amendment, and the Act was sustained against such contention. The federal question was squarely raised and passed upon, and there was no independent state ground upon which decision was rested.

It is settled law that even if a state statute is valid on its face, a decision of a state court applying the statute against a particular transaction in the face of a claim of unconstitutionality necessarily affirms the validity of the statute when so applied. The judgment is therefore reviewable by appeal as of right pursuant to 28 U.S.C. 1257 (2). *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951) 22. See also *Mullane* v. *Central Hanover B. & T. Co.*, 339 U. S. 306 (state statute held invalid on appeal as applied to certain persons who were given notice by publication only); *Walker* v.

[2] The court below cited the following decisions of this Court: *Mullane* v. *Central Hanover B. & T. Co.*, 339 U.S. 306; *Walker* v. *City of Hutchinson*, 352 U.S. 112; *Wisconsin Electric Power Co.* v *City of Milwaukee*, 352 U.S. 948.

*City of Hutchinson*, 352 U. S. 112, 115 (appeal held to lie from state statute providing notice by publication, and statute held invalid as to certain persons who could reasonably have been given personal notice); *Chesebro* v. *Los Angeles County Flood Control District*, 306 U. S. 459, 463.

## QUESTIONS PRESENTED[3]

A state statute permits annexation of territory to a county fire protection district only upon a determination by a county board of supervisors, after notice and hearing, that the land annexed is to be benefited. A purported annexation of property effected without actual notice, and without compliance with the provisions of the annexation statute for notice by publication, was held invalid by the court below. The annexation was nevertheless held to have been legalized by a subsequent statute providing for validation of defective transactions of public bodies generally,[4] specifically excepting, however, those transactions which could not be constitutionally validated.

The questions presented are:

1. Whether, under the rule of *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, a determination of a question as to what lands shall be

[3] While it is believed that the Federal questions in this case are substantial, clear cut and important, it is recognized that they may not have been stated with sufficient precision in the Statement as to Jurisdiction. Accordingly, we take the liberty of restating them.

[4] First Validating Act of 1958 (Juris. Statement App. "B" 18). The statute in sweeping terms purported to legalize proceedings of various kinds previously completed before more than 75 different kinds of public bodies in the State of California.

included in an assessment district, required by statute to be made after decision by a state tribunal as to whether the land included will be benefited, may constitutionally be made without personal notice where the interest, name and address of the property owner affected were known by, in the possession of and readily available to the state tribunal; and

2. Whether, under the Due Process Clause of the Fourteenth Amendment, an annexation invalid for lack of notice to an affected property owner may constitutionally be validated by subsequent, blanket curative legislation which neither contains nor imports any finding that the particular annexation at issue would benefit the land annexed or otherwise serve the public interest.

## SUBSTANTIALITY OF THE FEDERAL QUESTIONS

In the Statement as to Jurisdiction appellant may have failed to state with sufficient clarity the importance to the field of municipal law of t constitutional issues here presented.

This Court may judicially notice the existence of thousands of special taxing districts created in the various states for the purpose of obtaining revenue to finance particular improvements or particular activities of government. It is no exaggeration to say that if the decision to dismiss the appeal in this case stands, the decision below will be widely (and we think correctly) interpreted as furnishing a ready guide to defeating established due process rights in a myriad of cases. If the decision below stands unreversed, certain thoroughly established constitutional principles will

have been undermined, and several decisions of this Court overruled *sub silentio*. After briefing and argument of the case on the merits, this Court might conceivably affirm the decision below, but it is respectfully urged that any such departure from settled law should take place only after the fullest consideration.

**1. Constitutional Test as to Adequacy of Notice**

A series of decisions of this Court in recent years have emphasized the salutary principle that "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover B. & T. Co.*, 339 U. S. 306, 314.[5]

As this Court has had occasion to remark, "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best." *New York* v. *New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 296. In the present case, the Court is not confronted with a borderline type of notice found by a state court to be adequate to meet the reasonable notice test. The court below, having reviewed the standards established by this Court's decisions, held as follows (Juris. Statement App. "A" 9):

> The notice given here was not one of a character designed to bring home to the persons affected knowledge of the proceedings or to put them upon inquiry but was apparently designed as a mere

[5] Accord: *Milliken* v. *Meyer*, 311 U.S. 457; *Covey* v. *Somers*, 351 U.S. 141; *Walker* v. *City of Hutchinson*, 352 U.S. 112. And see *Lambert* v. *California*, 355 U.S. 225, 228.

> token compliance with the statute without regard as to whether it was in fact reasonably certain to inform those affected. *Such notice does not comport with due process within the rationale of the recent decisions of the Supreme Court of the United States.* [Emphasis added.]

The court below found that the "notice" here failed actually to inform appellant (Juris. Statement App. "A" 7), that it failed to comply with the applicable state statute (*id.* 6-8), and that notice by mail could reasonably have been given (*id.* 10). On the basis of the facts of record (Juris. Statement 6-7), it is inconceivable that any other conclusion could have been reached.

**2. Constitutional Requirement as to Notice**

Having recognized that if any notice was required, the "notice" here was insufficient under the Due Process Clause of the Fourteenth Amendment, the court below proceeded to hold that no notice was required. This conclusion was reached in connection with the court's consideration of the possible application of a curative statute—the First Validating Act of 1958 (Juris. Statement App. "B" 18). The abortive annexation having been held illegal (Juris. Statement App. "A" 7-8), the court noted that the curative statute, which validates on a blanket basis a variety of transactions of more than 75 different kinds of public bodies,[6] "does not purport to validate any ordinance or resolution which is void because of lack of due process * * * " (*id.* 8). Thus the court was squarely presented with the constitutional question as to the validity of the original annexation proceeding, and it proceeded squarely to pass upon it.

---

[6] See list, Juris. Statement App. "B" 18-20.

The court below held that, since the legislature itself could have made the determination as to the boundaries of a fire protection district without notice and hearing, and could have delegated such legislative authority to a municipality, the purported annexation here was not violative of due process. Hence, the validating statute applied. In reaching this conclusion the court misread or misapplied the decisions of this Court. (Juris. Statement App. "A" 10-13.)

Since the decision in 1896 in the leading case of *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, it has been established law that where, as here, a state legislature entrusts to a subordinate tribunal the function of determining whether land would be benefited by being included in a special tax district, the owners of the land affected are entitled to notice and hearing prior to the determination. The distinction explicitly drawn in that case is as follows (*id.* at 174-175):

> It has been held in this court that the legislature has power to fix such a [taxing] district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, *when it fixes the district itself*, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district; and the citizen has no constitutional right to any other or further hearing upon that question. * * * But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited; and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are

> thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. [Emphasis added.]

The distinction has been followed throughout the years. Thus, in cases where the legislature itself fixed the boundaries of a tax district or made the determination as to benefit, the Court has held the determination to be conclusive.[7] And where the full powers of the legislature have been delegated to a municipality, the same result has obtained.[8] But in all those cases where a subordinate organ of the state was given a fact-finding function with respect to benefit, the property owner has been held entitled to be heard before that quasi-judicial determination is made.

In the *Fallbrook* case, *supra*, the statute was construed as contemplating the requisite hearing. On the other hand in *Embree* v. *Kansas City and Liberty Boulevard Road District*, 240 U. S. 242, the Court held that (p. 247):

> As the district was not established by the legislature, but by an exercise of delegated authority, there was no legislative decision that its location, boundaries, and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, it was essential to due process of law that the landowners be accorded an opportunity to be

[7] *E.g. Wagner* v. *Baltimore*, 239 U.S. 213; *Valley Farms Co.* v. *Westchester*, 261 U.S. 155; *Milheim* v. *Moffat Tunnel District*, 262 U.S. 710; *Chesebro* v. *Los Angeles County Flood Control District*, 306 U.S. 459.

[8] *E.g. Withnell* v. *Ruecking Construction Co.*, 249 U.S. 62; *Hancock* v. *City of Muskogee*, 250 U.S. 454.

heard upon the question whether their lands would be thus benefited.

The same result was reached in *Browning* v. *Hooper*, 269 U. S. 396, where the Court held as follows (405):

> Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits. * * * *But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the legislature, and there has been no legislative determination that their property will be benefited by the local improvement.* [Emphasis added.]

The annexation procedure provided by the California legislature was exactly the kind which this Court held in *Fallbrook*, *Embree* and *Browning*, *supra*, must be preceded by adequate notice to affected property owners.[9] As the court below recognized (Juris. Statement, App. "A" 13), the legislature conferred upon the county board of supervisors a quasi-judicial function. That function was performed without due process being accorded to appellant.

The "hearing" held by the board of supervisors did serious violence to traditional concepts of fair play and due process. One John Hughes, a Fire Rating

[9] Health and Safety Code of State of California, Sections 14510-14515, Juris. Statement App. "B" 16-17. The Government Code of California, Section 58230, provides that "Any tract of land may be annexed to a district if the land will be benefited * * *." This section applies to county fire protection districts. Government Code, Section 58308.

Analyst who was an employee of the Los Angeles County Consolidated Fire District, testified as to the benefit question and no other evidence was offered because appellant was unaware that the proceeding was being conducted. The board duly found that appellant's property would be benefited and ordered the annexation. *The adversary proceeding contemplated by the statutory scheme never took place.*

It is significant that the only testimony before the board was perfunctory and pro forma. Hughes was asked the following two general questions, applicable to thirteen different annexation proceedings involving three separate fire protection districts (Juris. Statement App. "A", 5):

> Q. "Are you familiar with the territory sought to be annexed to the various Fire Protection Districts?"
>
> A. "I am."
>
> Q. "In each instance, in your opinion would the territory [proposed to be annexed] be benefited by the annexation if consummated?"
>
> A. "It would."

Appellant, as a result of not receiving notice of the proceeding, was deprived of the opportunity to challenge this vague opinion testimony or to offer substantial evidence on its own behalf to establish that inclusion of its property within the district would subject appellant to substantial liability for tax assessments (Health and Safety Code, Section 14516, Juris. Statement App. "B", 17) with no benefit to appellant.

After the abortive annexation proceedings, the legislature of California enacted the First Validating Act

of 1958 (Juris. Statement App. "B" 18), curative legislation of a general nature. But it could hardly be argued—certainly the court below did not hold—that this statute constituted an independent judgment by the legislature that this annexation (or any other particular annexation) was desirable.

The statute is blanket in character. It validates an indeterminate number of transactions whose identity, in the nature of things, could not be known to the legislature. In recognition of the catch-all character of the legislation, the statute specifically excepted from the categories of transactions validated any transaction initially void for lack of due process (Section 6 (b), Juris. Statement App. "B" 23).[10]

As the opinion of the court below recognized, the validating statute was not a new act of annexation; it purported only to validate previous transactions generally to cure purely technical defects (Juris. Statement App. "A" 8). The defect here was not technical—it was basic and constitutional in character.

By construing the validation statute to pour life into the previous void annexation attempt, the court below has made that statute an instrument for depriving appellant of due process of law. It has interpreted the statute in a manner which deprived appellant of

[10] If the legislature made an independent judgment at some later time that a particular annexation was desirable, its action in doing so might be held to import findings as to benefits. *Spencer* v. *Merchant*, 125 U.S. 345. But clearly such an action would have to be taken in a manner in which the finding as to benefit would be implicit. As was said in *Chesebro* v. *Los Angeles Co. Flood Control Dist.*, 306 U.S. 459, 462, the "particularity of the description" by the legislature may import the finding. In the present case, there was no particularity of description.

the constitutional right of hearing under the rules laid down by this Court in *Fallbrook*, *Embree* and *Browning*, *supra*. The statute was construed to legalize a proceeding depriving appellant of the reasonable notice to which it was constitutionally entitled under the rule of *Mullane* v. *Central Hanover B. & T. Co.*, 339 U. S. 306, and the other decisions of this Court respecting notice which are discussed above.[11]

The decision below would circumvent due process requirements by the device of labeling fire protection districts of the kind here involved "public corporations in the nature of municipalities" (Juris. Statement App. "A" 11). But the label applied to the district or the tribunal cannot affect the constitutional question and no case cited by the court below suggests that it can. Under the governing statute, the district here involved was only to be expanded if it was decided after hearing that the annexed land would be benefited thereby. The

[11] This Court is of course bound by the construction placed upon the statute by the court below. But this case illustrates how construction of a statute may unnecessarily make it repugnant to the Constitution. Had the validating statute been construed in accordance with its apparent intent, it seems evident that it would not have been applied to validate a constitutionally void annexation. Moreover, another section of the statute (Section 6(c)) in terms specifically exempts transactions being challenged in "legal proceedings" at the time of its enactment. Appellant at that time was vigorously challenging the validity of the annexation before the board of supervisors, but the court below held that the proceedings before the board did not constitute "legal proceedings," on the theory that the board had by that time exhausted its "quasi-judicial" function. Thus legal proceedings conceived to have been in the wrong forum were held not to be legal proceedings at all.

The judicial tendency reflected by this construction—to uphold annexation decisions by a board of supervisors even if a strained statutory construction results—serves to emphasize the intense practical importance of the constitutional right to advance notice of annexation proceedings.

decisions of this Court reviewed above make it clear that when that kind of decision is intrusted to a subordinate tribunal (whether municipal or otherwise) the right to notice and hearing is constitutionally protected.

State courts (other than the court below) which have had occasion to consider the question here presented have interpreted this Court's decisions as does appellant. Thus, in *Wisconsin Electric Power Co.* v. *City of Milwaukee*, 352 U. S. 948, this Court remanded to the Supreme Court of Wisconsin for consideration in light of the decision in *Mullane, supra*, a case involving a special assessment district where a taxpayer had been deprived of the opportunity to be heard because of lack of effective notice. On the remand, the applicable city charter provision providing for notice by publication was held invalid on the express authority of the *Mullane* decision. 275 Wis. 121, 81 N. W. 2d 298. And in a case on all fours with the present one the Supreme Court of Montana squarely held a fire protection district annexation invalid under the Due Process Clause of the Fourteenth Amendment for lack of reasonable notice, citing the *Mullane* decision *inter alia*. *Great Northern Ry. Co.* v. *Roosevelt County*, ___ Mont. ___, 332 P. 2d 501.

If the dismissal of this appeal is allowed to stand this Court will have indirectly ruled that the Wisconsin and Montana courts of last resort have misconstrued this Court's clear pronouncements in the *Mullane* case, *supra*, and other decisions delineating the constitutional standard as to reasonable notice. If this dismissal is allowed to stand, the unbroken line of decisions commencing 63 years ago with *Fallbrook Irrigation District* v. *Bradley, supra*, will in effect be overruled, and

the constitutional standards thought to have governed quasi-judicial proceedings of the type there involved will be drained of vitality.

If this Court is disposed to modify or overrule these settled lines of decisions, it is earnestly believed the Court should do so only after plenary briefing and argument, and the new rule should be articulated and delimited in an authoritative opinion of the Court. It would be consistent neither with judicial responsibility nor with the orderly development of law if a far-reaching departure from settled law should be effected through dismissal of an appeal.

## CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted, the order of dismissal vacated, and probable jurisdiction noted.

Respectfully submitted,

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I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

J. ROGER WOLLENBERG